IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-443

HUGH CAREY, individually and as Governor of the State of New York, LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York, ALBERT J. SICA, individually and as Executive Secretary of the Board of Pharmacy of the State of New York; and BOARD OF PHARMACY OF THE STATE OF NEW YORK,

Appellants,

against

POPULATION SERVICES INTERNATIONAL, DR. ANNA T. RAND, DR. EDWARD ELKIN, DR. CHARLES ARNOLD, THE REVEREND JAMES B. HAGEN, JOHN DOE and POPULATION PLANNING ASSOCIATES INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellants
2 World Trade Center
New York, New York 10047
212—488-7657

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ARLENE R. SILVERMAN
Assistant Attorney General
Of Counsel

INDEX

CASES CITED

STATUTES CITED:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-443

HUGH CAREY, individually and as Governor of the State of New York, LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York, ALBERT J. SICA, individually and as Executive Secretary of the Board of Pharmacy of the State of New York; and BOARD OF PHARMACY OF THE STATE OF NEW YORK,

Appellants,

against

POPULATION SERVICES INTERNATIONAL, DR. ANNA T. RAND, DR. EDWARD ELKIN, DR. CHARLES ARNOLD, THE REVEREND JAMES B. HAGEN, JOHN DOE and POPULATION PLANNING ASSOCIATES INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

Opinions Below

The opinion of the single district judge granting the motion to convene a three judge court, dated October 23, 1974, is reported at 383 F. Supp. 543 (45a).* The opin-

* Numbers in parentheses refer to Joint Appendix or Appendix to Jurisdictional Statement (J.S.).

ion of the three judge court, dated July 2, 1975, is reported at 398 F. Supp. 321 (J.S. 1a-35a). Probable jurisdiction noted. 44 U.S.L.W. 3697 (U.S. June 7, 1976).

Jurisdiction

Appellants invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1253. The judgment of the three judge court was entered on July 18, 1975 (72a). The notice of appeal was filed on July 24, 1975 (J.S. 36a-37a). Probable jurisdiction was noted on June 7, 1976.

Statute Involved

New York State Education Law § 6811(8) (McKinney 1972)

"It shall be a class A misdemeanor for:

• • •

8. Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of contraception to a minor under the age of sixteen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles, within or without the premises of such pharmacy, is hereby prohibited."

Questions Presented

(1) Did the District Court correctly conclude that appellees Population Planning Associates, Inc. and Hagen had standing to challenge New York Education Law § 6811(8)?

(2) May a State statute provide that only licensed physicians may sell or distribute contraceptives to minors under

sixteen and only licensed pharmacists or physicians may sell or distribute such products to persons sixteen years or older?

(3) May a State statute proscribe the commercial advertisement and display of contraceptive products?

Statement of the Case

The Statute

Section 6811(8) of the New York Education Law was enacted in its present form in 1965.* Although in recent years various legislators have sought to alter its provisions in one way or another (New York Legislative Record and Index for 1974, A6843-B; New York Legislative Record and Index for 1973, S3067-A4368, S74-S3068-A4369, A1820, and S77-S3049-A4371; New York Legislative Record for 1972, S2181B), the New York Legislature has continued to reaffirm its belief that Section 6811(8) is a proper exercise of the State's police power and necessary and important legislation.

During debate on Assembly Bill 6843-B on April 18, 1974,** assemblymen expressed their concern that a repeal of the provisions prohibiting contraceptive displays in pharmacies would be detrimental to the youth of New York and increase, add to, or cause a promiscuous society (Assemblyman Green); expose children to contraceptive displays when they go into drugstores which frequently sell, among other things, candy (Assemblyman Mannix); lead to all kinds of advertising slogans (Assemblyman Gazzara); expose clerks in supermarkets, frequently young

---

* This statute originally appeared as Section 1142 of the New York Penal Law. It was repealed from the Penal Law and enacted into the Education Law as § 6804-b. In 1971, it became § 6811(8) of the Education Law.

** A transcript of a debate in the New York Assembly on Assembly Bill 6843-B on April 18, 1974 and in the New York Senate on Senate Bill 2181-B on April 17, 1972 was submitted to the District Court.

girls, to undesirable comments and gestures (Assemblywoman Connelly); be permission for the young people of the State to go out and be permissive (Assemblyman Eposito) and interfere with the responsibility of parents for educating their children (Assemblyman Nicolosi).

Similar concerns were expressed during a Senate debate on April 17, 1972. Permitting the sale of contraceptives to children 10, 11, 12 or 13 years old will bring a great deal of immorality to our country (Senator Gioffre); will promote promiscuity, venereal disease, abortion and unwanted pregnancies (Senator Donovan) and give kids a license to be permissive (Senator Conklin).

In short, the legislators expressed concern that the repeal of § 6811(8) would lead to advertisements and displays of contraceptive products that would be offensive and embarrassing to many and would legitimize sexual activity by the young citizens of their State.*

The Appellees

Plaintiff Population Services International (PSI) alleged that it is a nonprofit corporation whose primary objectives are to discover and implement new methods of

---

* Various states have statutes restricting the sale or distribution of contraceptive products generally or prophylactics specifically. Arkansas, Colorado, Idaho, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, Oregon, Tennessee (City of Knoxville), Texas, Utah, Wisconsin, Virginia, and the District of Columbia, limit their sale by a licensed pharmacist or druggist (physicians are usually exempted from the operation of these provisions). Additionally, at least twenty-one states restrict the advertisement and/or display of all or some contraceptive devices. Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Indiana, Iowa, Kentucky, Massachusetts, Michigan, Montana, New Jersey, Oregon, Pennsylvania South Dakota, Utah, West Virginia, Wisconsin and Wyoming. For a more detailed survey and study, see Report of the National Center for Family Planning Services, *Family Planning, Contraception, and Voluntary Sterilization: An Analysis of Laws and Policies in the United States, Each State and Jurisdiction* (Dept. of HEW Pub. No. (HSA) 74-16001, 1974).

conveying birth control information and services to persons not now receiving them. It alleged that its activities include the test marketing of contraceptive products and advertisement of contraceptive products (4a-5a). Although PSI stated that it performs its educational, scientific and research activities in the United States, including the State of New York (5a), PSI did not allege that any official of the New York State Board of Pharmacy or the Attorney General's office had ever communicated with it, much less threatened it with any legal action.

Dr. Anna T. Rand, Dr. Edward Elkin and Dr. Charles Arnold alleged that they are physicians licensed to practice medicine in New York State who treat sexually active minors over and under the age of sixteen (5a-7a).

The Reverend James B. Hagen (Hagen) alleged that he is an ordained minister of the Protestant Episcopal Church and that he is the coordinator of the Sunset Action Group Against V.D. It sponsors a program in which male contraceptive devices are sold and distributed to local residents both over and under the age of sixteen at the church and at a local retail store which is not a licensed pharmacy (7a). He does not allege that any defendant has threatened him with legal action if he does not stop such sales.

John Doe alleged that he is forty-three years of age, that he is married and the father of four children, two of whom are under the age of sixteen. He alleged that he engages actively in sexual conduct and that he lives two miles from his licensed pharmacist (7a, 13a).

Population Planning Associates (PPA) alleged it is a North Carolina business corporation which maintains an office in New York City. It engages primarily in the retail sale of non-medical contraceptives through the United States mails. PPA advertises its products in national periodicals entering New York State and, from time to time, places advertisements for its products in local periodicals in New York State (7a-8a).

PPA alleged that in December 1971, over two and a half years before appellees instituted their suit, it received a letter from appellant Sica, Executive Secretary of the New York State Board of Pharmacy, advising PPA that an advertisement for the sale of condoms in an issue of the Utica College Tangerine was in violation of the Education Law (9a). Approximately one and a half years before this action was instituted, it received a letter written on behalf of appellant Sica advising PPA that the sale of contraceptives to minors under the age of sixteen was prohibited, that sales of contraceptives were limited by licensed pharmacists and that if PPA failed to comply with the statute, the matter would be referred to the Attorney General of the State of New York (9a).

PPA further alleged that on September 4, 1974, two inspectors from the State Board of Pharmacy threatened legal action if it did not discontinue an advertisement appearing in the September 1974 issue of Playgirl Magazine (14a). This advertisement solicited, *inter alia,* sales of prescription contraceptives, birth control pills, notwithstanding that PPA does not employ a pharmacist licensed in New York State (20a, 70a). Moreover, Victor J. D'Amico, an inspector with the Board of Pharmacy, in an affidavit submitted to the District Court, denied that legal action was threatened and stated that the visit was for informational gathering purposes only (69a-70a).

Although the complaint raised various constitutional arguments, appellees moved the District Court for summary judgment, attacking Section 6811(8) insofar as it applied to nonprescription contraceptives under 42 U.S.C. § 1983 on the grounds, *inter alia,* that it infringed the constitutional right of New York State residents, including minors under the age of sixteen, to have access to nonprescription contraceptives which is a fundamental constitutional right embraced within the right of privacy, and that the restriction on advertisement and display violated the First Amendment rights of New York State residents to receive information concerning such products as well as appellees' own right to dispense such information.

The Opinion of the District Court

The District Court examined the standing of the various appellees. The Court held that appellees PPA and Hagen had standing to challenge § 6818(8) and, accordingly, did not reach the issue of the standing of the remaining appellees.* (J.S. 9a-11a) The Court then turned to the merits of the action and considered plaintiffs' claim that the right of privacy encompasses the right to have access to nonprescription contraceptives and held that access to contraceptives is an aspect of the right of privacy encompassed within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment. The Court did not decide that this particular aspect of the right of privacy was "fundamental" but nonetheless scrutinized the three provisions of § 6811(8) to determine whether as drafted, they were, in fact, sufficiently related to a legitimate State interest to justify infringement of the right at stake, the standard adopted by the Second Circuit in *Boraas* v. *Village of Belle Terre,* 476 F. 2d 806 (2d Cir. 1973), *rev'd on other grounds,* 416 U.S. 1 (1974). (J.S. 13a)

Insofar as Section 6811(8) required that children under sixteen years of age obtain nonprescription contraceptives from licensed physicians, the District Court, while purporting to recognize that issues relating to sexual intercourse by minors below a certain age are matters with which the State may be legitimately concerned, held that the State had failed to prove that Section 6811(8) was substantially related to the State's goal of deterring sexual activities by minors under sixteen. (J.S. 18a)

---

* Appellants disputed the standing of the remaining appellees to maintain this lawsuit on various grounds. Dr. Rand, Dr. Elkin and Dr. Arnold were exempted from the provisions of § 6811(8) by § 6807(1)(b) which permits a physician to supply his patients with such drugs as he deems proper in connection with his practice. John Doe was never identified, the truth of his allegations was unascertainable, and they were, in any event, chimerical. PSI failed to allege any threat of prosecution.

As for the prohibition on sale or distribution by anyone other than a licensed pharmacist, the Court concluded that even if the State had some legitimate interest in imposing some regulations on advertising and display of nonprescription contraceptives and in limiting, to some extent, the persons to whom such products may be sold, the interests advanced by the State were not sufficient to justify the limitation which it placed on the right of access to nonprescription contraceptives, i.e., by making them available only from a licensed pharmacist or a physician. (J.S. 19a-22a)

With regard to so much of Section 6811(8) as prohibited advertisement and display, the District Court concluded that the State's bar on advertisement and display was facially overbroad since it could reach "public interest" and mixed, as well as purely commercial advertising and display. (23a-26a)

Summary of the Argument

Appellees PPA and Hagen are without standing to attack the provisions of New York Education Law § 6811(8) since they have never been seriously threatened with prosecution for any violation of this statute notwithstanding that PPA and Hagen allege that they have continuously and repeatedly acted in derogation of its provisions.

The District Court improperly struck down New York Education Law § 6811(8) which consistently with applicable constitutional standards set forth that contraceptives may only be sold by licensed pharmacists and that children under sixteen years of age must obtain such products from physicians. Since this statute does not regulate use of contraceptives but simply access, the provisions of § 6811(8) do not affect a fundamental right and must be measured by the traditional equal protection test, is the statute reasonable and rationally related to a valid

State interest. The statute meets this test.

The provision that permits only pharmacists to sell contraceptive products is a reflection of the legislative concern that young people not sell contraceptive products, permits quality control of the product and allows the State Board of Pharmacy to police so much of § 6811(8) which forbids display of contraceptive products in licensed pharmacies and sales to children under sixteen. Permitting children under the age of sixteen to obtain contraceptives only from a licensed physician accommodates the needs of sexually active youngsters while expressing societal disapproval of sexual activity by pre-teenagers and those in their early teens. Even if the compelling State interest test is applied, these reasons for the statute render it immune from an equal protection attack.

As far as the proscription on advertisement and display, this provision is justified since it aids in preserving the values of the younger citizens of New York State and, additionally, avoids offending the sensibilities of the adult citizens of the State.

POINT I

Appellees PPA and Hagen have no standing to maintain this action since they do not allege in certain terms that appellants have threatened to prosecute them.

The District Court held that appellees PPA and Hagen had standing to challenge § 6811(8) of the Education Law in its entirety. However, these appellees have failed to meet the case or controversy requirement of Article III of the Constitution and are without standing to maintain this action. *Golden* v. *Zwickler,* 394 U.S. 103 (1969); *Poe* v. *Ullman,* 367 U.S. 497 (1961); *Watson* v. *Buck,* 313 U.S. 387 (1941). We raise this issue of necessity because of the jurisdictional requirement of a justiciable controversy.

Among the factors which are necessary to show the existence of an actual controversy where a state criminal statute is involved is the "imminence and immediacy of proposed enforcement". *Watson* v. *Buck, supra* at 400.

The complaint fails to allege that there have been any prosecutions under § 6811 (8) of the New York Education Law and appellees' position at bar is almost identical to plaintiffs in *Poe* v. *Ullman, supra* at 508, where the court found a lack of a case or controversy:

> "The fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication."

Notwithstanding that appellee PPA has received two letters from defendant Sica as Executive Secretary of defendant Board of Pharmacy (9a), these letters hardly provide the requisite threat of prosecution found in *Doe* v. *Bolton,* 410 U.S. 179 (1973). The first letter, dated December 1, 1973, did not even mention prosecution, and although the second letter, dated February 23, 1973, did threaten possible legal action, appellee PPA was so little intimidated by the threat that it waited over a year before commencing this action on April 5, 1974. Moreover, although PPA alleged a visit to its premises on September 4, 1974 (10a), this visit was a response to an advertisement offering prescription contraceptives for sale in addition to nonprescription contraceptives, notwithstanding that PPA does not employ a pharmacist licensed in New York State. As attested to by Victor D'Amico, an inspector with the New York State Board of Pharmacy (69a), this visit was for informational gathering purposes only and appellee has failed to pinpoint any case in which actual legal action was instituted under similar circumstances.

The fact that the Board of Pharmacy has been aware of the activities of appellee PPA since at least December 1,

1973 and yet has never caused the initiation of legal action, coupled with the fact that plaintiffs failed to allege any prosecutions under the current statute, indicates that appellee PPA's fear of prosecution is indeed "chimerical".* Therefore, appellee PPA's claim of standing to attack § 6811 (8) is deficient under the *Poe* rule. *A fortiori* the claim of standing of appellee Hagen must also fail.

Even if appellee PPA had demonstrated a realistic fear of prosecution for advertisement and distribution of nonprescription contraceptives, in the context of this case, it is not a suitable representative to raise the alleged privacy rights of users of contraceptive products. The interest of PPA in this litigation is purely commercial, purely those of a seller, as opposed to the interests of Baird who was a genuine advocate of the rights of the unmarrieds in the State of Massachusetts.

POINT II

New York Education Law § 6811(8), in conjunction with New York Education Law § 6807(1)(b) reflects a proper legislative judgment that there be quality control of nonprescription contraceptives and that societal disapproval of sexual intercourse by children under sixteen be expressed.

The District Court, relying principally on *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972), and *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), held that access to contraceptive products is an aspect of the right of privacy, *i.e.,* a right

---

* Of course, assuming the validity of so much of § 6811(8) as permits only pharmacists to sell nonprescription contraceptives, the appelles, being nonpharmacists, are without standing to challenge the statutory scheme. As for challenging § 6811(8) on the ground that it interferes with the receipt of information regarding contraceptive products, Hagen does not allege that he is deterred in this regard. *Mercer* v. *Board of Education,* 379 F. Supp. 580 (E.D. Mich. 1974), *aff'd,* 419 U.S. 1081 (1974).

encompassed within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment, without reaching the issue whether such right of access is a fundamental right which would require a "compelling State interest" to justify its abridgment (J.S. 13a).

The District Court concluded, citing the opinion of the United States Court of Appeals for the Second Circuit in *Boraas* v. *Village of Belle Terre,* 476 F. 2d 806 (2d Cir. 1973), *rev'd on other grounds,* 416 U.S. 1 (1974), that it must carefully scrutinize the provisions of Section 6811(8) to determine whether such provisions are, *in fact,* sufficiently related to a legitimate State interest to justify their infringement on the constitutional right, carved out by the District Court, of access to contraceptive products. (JS 13a)

In so doing, the District Court applied an improper standard to the provisions of Section 6811(8) which provide that only a licensed pharmacist may sell non-prescription contraceptive products and that children under sixteen must receive such products from a physician, effectively treating a right of access to contraceptives as a fundamental right, notwithstanding that the District Court did not, and indeed, could not, find such right to be fundamental.

New York in providing that only licensed pharmacists or physicians, where children under sixteen are concerned, may distribute contraceptives has merely regulated the sources from which individuals may obtain contraceptive products. New York does not prohibit the use or distribution of contraceptives to any of its citizens. Accordingly, the statutory scheme under attack here hardly reaches the level of "governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child", *Eisenstadt* v. *Baird, supra* at 453, the issue before this Court in *Griswold* and later in *Roe* v. *Wade,* 410 U.S. 113 (1973), and *Planned Parenthood of*

Central Missouri v. *Danforth,* 44 U.S.L.W. 5197 (U.S. July 1, 1976).

The Court in *Griswold* makes this distinction clear. It was careful to note that the Connecticut law at issue in *Griswold* concerned a relationship lying within the zone of privacy created by several fundamental constitutional guarantees since it forbade the use of contraceptives and did not simply regulate their manufacture or sale. *Griswold, supra* at 485.

The fact that the existence of one constitutional right does not create another constitutional right in a related area was made clear in *Rodriguez* v. *San Antonio Independent School District,* 411 U.S. 1 (1973), where the Court stated that substantive constitutional rights may not be judicially created, but must be explicitly or implicitly guaranteed by the Constitution. *Id.* at 33-34. The appellant in *Rodriguez* claimed that education is a fundamental constitutional right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. The court disagreed, holding that there was no explicit right to education, and that although education may be related to First Amendment rights and the right to vote, such relationship does not create a constitutionally protected status for education.

By applying the standard enunciated by the Second Circuit in *Boraas,* the District Court applied a stricter constitutional standard than warranted to state legislation which establishes a classification. Such standard has never been adopted by this Court and indeed was specifically rejected by this Court on appeal in *Boraas* and in *Rodriguez.* It is for the legislature, not the courts, to balance the advantages and disadvantages of the regulation. *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955); *Beauharnais* v. *Illinois,* 343 U.S. 250 (1952). Where a classification is involved, it is only necessary that it be

reasonable, and "that the State's system be shown to bear some rational relationship to legitimate state purposes." *Rodriguez* v. *San Antonio Independent School District, supra* at 40.

The New York Legislature has expressed a proper concern that young people not sell contraceptives and has provided that only licensed pharmacists may sell contraceptive products. This assures that only persons of mature years will be involved in the sale of such products. Moreover, limiting the sale by licensed pharmacists allows purchasers to inquire as to the relative qualities of the varying products and prevents anyone from tampering with them. *North Dakota Pharmacy Board* v. *Snyder's Stores*, 414 U.S. 156 (1973).

By permitting only licensed pharmacists to sell contraceptive products, the State Board of Pharmacy, which employs investigators to assure implementation of the Pharmacy Law (Education Law § 6804) is able to police so much of Section 6811(8) which forbids display of contraceptive products in licensed pharmacies and sales to minors under sixteen. If the sale of contraceptive devices were permitted in other establishments as well, the burden of policing these provisions would be prohibitive.

In considering this regulation, the Court should note that there is no claim that there are an insufficient number of pharmacies in New York State, and appellees' argument in this regard does not raise a serious issue. New York State has not limited the sale of contraceptives by a handful of establishments. As this Court observed in *Young* v. *American Mini Theatres*, 44 U.S.L.W. 4999, 5002 (U.S. June 24, 1976), "(V)iewed as an entity, the market for this commodity is essentially unrestrained."

Both prescription and nonprescription contraceptive products and devices are available to children under sixteen in New York State if dispensed directly by a

physician.* Neither the use nor distribution of contraceptives to these children is banned. Nor is parental consent required. *Compare Planned Parenthood of Central Missouri* v. *Danforth, supra.* New York has simply determined that the authorization for such distribution should come directly from a doctor, and does not want contraceptives being sold over the counter to very young children. Such a policy, it is believed, would sanction sexual activity by these youngsters, contrary to the public policy of New York State. Placing a physician between the child and the contraceptive product or device heightens the importance society attaches to a decision to partake in sexual activity at such a young age while, on the other hand, accommodating the needs of those sexually active children who disregard the socially prescribed standard. Such a statutory scheme does not violate the constitutional rights of a youngster under sixteen.

It is well established that a state can regulate morality. This Court only recently affirmed a decision of the United States District Court for the Eastern District of Virginia, *Doe* v. *Commonwealth's Attorney for the City of Richmond*, 403 F.Supp. 1199 (E.D.Va. 1975) (3 judge court), *aff'd*, 44 U.S.L.W. 3543 (U.S. March 30, 1976), *reh. denied*, 44 U.S.L.W. 3660 (U.S. May 18, 1976), which upheld the constitutionality of a sodomy statute as applied to consensual and private sexual activities between adult males. Many states have had and still have statutes and decisional law prohibiting fornication and adultery. See *State of New Jersey* v. *Lair*, 62 NJ 388, 301 A. 2d 748, 58 ALR 3d 627 (1973), and the accompanying ALR Annotation. The State has the right to enact laws to promote the public health, safety and morals of its citizens. *Griswold* v. *Connecti-*

---

* The District Court erroneously states that New York Social Services Law § 350(1)(e) and § 365-a(3)(e) are exceptions to Education Law § 6811(8). Insofar as the Social Services Law provides for distribution of contraceptives to eligible persons of child-bearing age who are sexually active, if such person is less than sixteen years of age, such products must be made available through a physician.

cut, supra at 498 (GOLDBERG, J., concurring); *Poe* v. *Ullman, supra* at 546 (HARLAN, J., dissenting). In line with this, the Court, in *Roe* v. *Wade, supra* at 154, observed:

> ". . . [I]t is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions".

In addition to regulating morality, it is also well established that minority as a classification has always had judicial sanction. *George* v. *United States,* 196 F. 2d 445 (9th Cir.), *cert. denied,* 344 U.S. 843 (1952). Because of its strong and abiding interest in youth, the State may regulate minor's access to material which a State clearly could not regulate as to adults. *Interstate Circuit* v. *Dallas,* 390 U.S. 676, 690 (1965). This proposition was only recently affirmed by this Court.

> "The court indeed, however, has long recognized that the State has somewhat broader authority to regulate the activities of children than adults." *Planned Parenthood of Central Missouri* v. *Danforth, supra* at 5204.

Although the age of maturity differs with different children, the legislature may make classifications as to age which will not be interfered with by the courts unless they are clearly unreasonable and arbitrary. *In re Morrissey,* 137 U.S. 157 (1890); *Jacobson* v. *Lenhart,* 30 Ill. 2d 255, 195 N.E. 2d 638 (1964); *Ex Parte Weber,* 149 Cal. 392, 86 P. 809 (1906). If different levels of maturity were to preclude age classification, all children would be allowed to vote and have access to alcoholic beverages and obscene material.

New York rationally has determined that unregulated exposure of minors to contraceptives, as argued for by

appellees, instead of decreasing out-of-wedlock births and venereal diseases, as appellees contend, would increase them since such complete exposure would sanction and as a result encourage sexual intercourse by young children.*

Such a conclusion has authoritative support. In discussing the availability of pornography, Dr. Gaylin of the Columbia University Psychoanalytic Clinic, made an observation equally applicable at bar:

> "(Psychiatrists) . . . made a distinction between the reading of pornography, as unlikely to be *per se* harmful, and the permitting of the reading of pornography, which was conceived as potentially destructive. The child is protected in his reading of pornography by the knowledge that it is pornographic, i.e., disapproved. It is outside of parental standards and not a part of his identification processes. To openly permit implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval—another potent influence in the developing ego." Gaylin, Book Review, 77 Yale L.J. 579, 594 (1968)

He goes on to state:

> "It is not for me, a psychiatrist, to lecture judges and legal scholars on the role of the law, but they must certainly be aware of the fact that when you make something legal you are doing more than making it allowable or exempt from prosecution. In our society, legal means legitimate, and legitimate means more. It means sanctioned and psychologically, at least, sanc-

---

* New York accords special status to minors in other areas as well, *e.g.,* New York Domestic Relations Law § 15(2); New York Penal Law §§ 30.00; 130.30, 130.35, 130.40, 130.45, 130.50.

tioned implies approved, supported and even encouraged."* *Id.* at 593-594.

As the New York Legislature has noted, and as the reasoning of Dr. Gaylin confirms, deregulation of contraceptives for children under sixteen would be viewed as societal approval of their engaging in sexual intercourse. Moreover, teenagers often fail to use contraceptives even when available. Thus, the Legislature could rationally conclude that increased sexual activity with concomitant increased pregnancies and venereal diseases would result from abolition of all controls over distribution of contraceptives to children under sixteen. Appellees, in the District Court, failed to show that the availability of contraceptives would lead to their widespread use by children under sixteen.

Surveys have shown that although many teenagers do not use contraceptives, in most instances this is not due to the fact that they are unavailable. R. C. Sorensen, *Adolescent Sexuality in Contemporary America—Personal Values and Sexual Behavior Ages 13-19,* at 322-326 (1973); M. Schofield, *The Sexual Behavior of Young People* (1965). Psychologist Schofield concludes:

> "Our inquiries into the use of birth control methods among teenagers has shown that many boys are not using contraceptives and most girls who are having intercourse are at risk. This does not seem to be because teenagers have difficulty in obtaining contraceptives but because social disapproval means that many of their sexual adventures are unpremeditated and

* Dr. Gaylin gives as an example the liberalization of the narcotic laws in England. There was an increase in addiction among younger, healthier individuals. He says the same thing is happening with marijuana. "Whether this is desirable or not is another question not pertinent here. The point is that legalizing it would enhance its chances of becoming a social institution." *Id.* at 595.

> therefore adequate precautions have not been taken beforehand; many of the teenagers are aware of the risk, but in these extemporary situations sexual desire may override this awareness of the possible consequences." *Id.* at 251.

In discussing the failure of young people to use contraceptives notwithstanding their availability, another study observes:

> "[It] . . . may be that one of the greatest deterrents to use of contraceptives among teenagers is the episodic nature of sex among this group. Family planing assumes both a family context and the possibility of rational planning. When, however, sexual encounters are episodic and perhaps unanticipated, passion is apt to triumph over reason." Kantner and Zelnik, *Contraception and Pregnancy: Experience of Young Unmarried Women in the United States,* 5 Family Planning Perspectives, Winter 1973, at 22.

The sporadic use of contraceptives is confirmed by other statistical data. The overwhelming number of out-of-wedlock births occur in the 15-19 year age group, and four-fifths of that group have access to contraceptives in New York from pharmacists. *U.S. Bureau of the Census, Statistical Abstract of the United States: 1973,* at 54 (94th Ed. 1973). A study done by the Communicable Disease Center in Atlanta, Georgia, indicates that the availability of prophylactics bears no necessary relation to the incidence of venereal disease.*

Moreover, educating the youths as to the purposes of birth control is not the answer.

* See Exhibit B to appellants' memorandum in the District Court in opposition to appellees' motion for a three judge court.

> "Early 'knowledge' without judgment and intellectual capacity enormously complicates the problem. . . . The theory, of course, is that knowledge is always better than ignorance and that an early, natural and educational approach will lead to understanding . . . This theory overlooks the importance of timing in the process of education." *Hechinger and Hechinger, Teenager Tyranny,* 48 (1963).

In any event, contrary to the impression created by appellees in the District Court, the problem of venereal disease among youngsters is not as great as appellees would have the Courts believe. The Schofield study concludes

> "These results suggest that promiscuity, although it exists, is not a prominent feature of teenage sexual behavior. Consequently the risks of venereal disease are not very great." Schofield, *supra* at 253.

Kanter and Zelnik, *supra,* at 23, also point out that using contraception increases the risk that a young child's sexual activity will be discovered. The child's fear of discovery by his or her parents is another frequent disincentive to the use of contraceptives.

There are, of course, other considerations, equally pertinent here. Sanctioning sexual activity by making nonprescription contraceptives so widely available will counter any influence that fear of pregnancy has as a deterrent to sexual intercourse by young children and, on the other hand, will increase pressure on the immature mind to go along with the crowd. Finally, current technology offers no contraceptive device that fully meets the standards of acceptability, effectiveness and safety. A. Etzioni, *Genetic Fix* 162-164 (1973).

In short, permitting the widespread availability of contraceptives would lead to increased sexual intercourse by young children and it is the scheme argued for by appellees in the District Court that would increase the number of unwanted pregnancies and incidence of venereal disease.

Even if there were no evidence that teenage extramarital sexual activity increases in proportion to the availability of contraceptives, unless such link is explicitly disproved, it is not irrational for the legislature to restrict access to contraceptives in the hope of limiting that activity.

> "To be sure, there is no lack of 'studies' which purport to demonstrate that obscenity is or is not 'a basic factor in impairing the ethical and moral development. . . .' But the growing consensus of commentators is that 'while these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either.' We do not demand of legislatures 'scientifically certain criteria of legislation' ". *Ginsberg* v. *New York,* 390 U.S. 629, 641-643 (1968)

In sum, the New York statutory scheme which permits only pharmacists and physicians to distribute contraceptive products to persons sixteen years and older and only physicians to distribute them to children under sixteen is reasonable and rationally related to the legislative purpose. Moreover even if measured by the strict scrutiny test, these provisions pass constitutional muster. In view of the number of pharmacists in New York, any limitation on the access of adults to contraceptive products is *de minimus,* if it exists at all. As for children under sixteen, the morality and physical and emotional safety of these youngsters is a compelling state interest which warrants placing the physician between the child and the contraceptive device to deny state approval to sexual intercourse by children under sixteen while recognizing that when such intercourse occurs, a physician's counseling is appropriate. There can

be no doubt that even in the privacy area, a minor's rights are not unlimited. This was recognized only recently by this Court in *Planned Parenthood of Central Missouri* v. *Danforth, supra* at 5204

> "We emphasize that our holding that § 3(4) is invalid does not suggest that every minor regardless of age or maturity, may give effective consent for the termination of her pregnancy."

POINT III

Section 6811(8), which bars commercial advertisement and display of contraceptive products, is a reasonable regulation that serves a legitimate public interest.

Appellants argued, and the District Court agreed, that advertisements and displays which are purely commercial may validly be regulated by the State. However, the District Court went on to invalidate the advertisement and display provisions of § 6811(8) on the grounds that the statute bars "public interest" and "mixed" as well as purely commercial advertising and display. Although the District Court observed that the PPA advertisements in the record before it represented purely commercial speech, the Court held that in the First Amendment area even litigants whose speech could properly be regulated by a narrowly drafted statute may challenge an overbroad statute on its face.

Noting that the New York Education Law § 6802(19) (McKinney 1972) defines "advertisements" as "all representations disseminated in any manner or by any means, other than by labeling, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of drugs, devices, or cosmetics", the District Court went on to find the advertisement and display provisions

of Section 6811(8) overbroad. The District Court did not detail the exact aspects of Section 6811(8) which it regarded as overbroad and appellants submit that Section 6811(8) limits only commercial advertisement of contraceptive products and is not constitutionally overbroad.

Section 6802(19) speaks of representations of a particular drug, device, or cosmetic that will lead directly or indirectly to the purchase of the article. This is a definition of a normal commercial advertisement and, indeed, so far as this record indicates, Section 6811(8) has never been applied to any material that was not of a purely commercial nature.

The applicable test is whether the statute conveys "sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices." *United States* v. *Petrillo,* 332 U.S. 1, 8 (1947). Even in criminal cases, where the overbreadth standard is the most stringent, the statute must only demonstrate an "ascertainable standard of guilt." *Winters* v. *People of State of New York,* 333 U.S. 507 (1948).

> "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense . . . The Constitution does not require impossible standards." 332 U.S. at 7.

The word "advertisement" has a clearly commercial connotation, and it strains credulity to accept any argument that the use of such word in § 6811(8) suffers from overbreadth. Unlike the statute involved in *Bigelow* v. *Commonwealth of Virginia,* 421 U.S. 809 (1975), Section 6811 (8) speaks only in terms of advertisements, does not refer to publications or lectures, and is more limited in its scope than Va. Code § 18.1-63 under attack in *Bigelow.* In short, it proscribes strictly advertisements and displays.

Although this Court has permitted individuals to challenge a state statute on the grounds that it is facially overbroad even though the individual's own conduct could be regulated by a more narrowly drawn statute, such attacks should not be sustained where there is no serious dispute as to the statute's meaning and where the statute is susceptible of a constitutional construction and, indeed, has always been applied consistent with such constitutional construction. Such is the case here. *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973).

Moreover, the proscription on commercial advertisement of contraceptive products is a reasonable regulation since it reflects a legitimate legislative concern that individuals not be exposed to displays and advertisements of contraceptive products which may be offensive and embarrassing to many. It additionally indicates a concern that display and advertisement of contraceptive products will lead to legitimization of sexual activity on the part of young citizens of New York State and increased promiscuity. *Cf. Planned Parenthood Committee* v. *Maricopa County,* 92 Ariz. 231, 375 P. 2d 719 (Sup. Ct., 1962).

> "Advertising, like all public expression may be subject to reasonable regulation that serves a legitimate public interest." *Bigelow* v. *Virginia, supra* at 826.

This principle was only recently reaffirmed by the Court:

> "In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 44 U.S.L.W. 4686, 4692 (U.S. May 24, 1976)

Moreover, as explained by the Court in *Young* v. *American Mini Theatres, supra* at 5005, n. 32:

> ". . . [T]he 'difference between commercial price and product advertising . . . and ideological communication' permits regulation of the former that the First Amendment would not tolerate with respect to the latter."

At the current time, the problems of overexposure of our youth to a mythology that represents that sexual satisfaction is all important is having dire consequences for the healthy development of these youngsters:

> "Within these urban conditions has grown up the tennage mythology, built up by the press, the advertizers, and the special teenage and pop music magazines. This has created an image of how the teenager is supposed to be behaved. . . . There is a danger that a teenager may feel he is exceptional because he has not had sexual intercourse." Schofield, *supra,* 256.

This is also documented and artfully explained by Hechinger and Hechinger, *supra.* Recognizing these problems and the tragic consequences for today's youth, the New York Legislature, as well as the legislatures of many other states,* has limited the commercial advertisement and display of contraceptive products.

In so doing, the legislature additionally has heeded the sensibilities of today's adults who might also be embarrassed by the advertisement and display of contraceptive products, not only directly, but by being put in the position of answering inquiries from their very young children who, in the parents' judgment, are not ready for such explanations.

This point is perhaps most strongly driven home by appellees themselves. The complaint in this action alleges that one of the appellees engages in sexual intercourse. But yet this appellee refuses to identify himself by name for fear of embarrassment. (7a)

---

* See note, *supra,* p. 4.

In *Stanley* v. *Georgia*, 394 U.S. 557, 567 (1969), the Court recognized that a state may validly regulate the distribution of publications in order to prevent potential exposure to children or intrusion upon the sensibilities of persons who do not wish to view them. In *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973), similar sentiments were expressed.

Information about contraception is available to all in New York who wish it. The State has merely determined that such information come from noncommercial sources so that it is free of potentially offensive advertising pitches and does not have the effect of encouraging sexual intercourse by New York children.

Viewed in this context, § 6811(8) is consistent with the First Amendment guarantee of the Constitution.

CONCLUSION

The order of the District Court granting appellees summary judgment should be reversed and judgment entered for the appellants.

Dated: New York, N.Y., August 2, 1976.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellants
2 World Trade Center
New York, New York 10047
212-488-7657

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ARLENE R. SILVERMAN
Assistant Attorney General
Of Counsel